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IN THE

Supreme Court of the United States

ROBERT MARIANA, MICHAEL J. McFADDEN, KAREN M. MORAN, and EDWARD M. NANKERVIS,

Petitioners,

v.

D. MICHAEL FISHER, in his official capacity as Attorney General of the Commonwealth of Pennsylvania; and LARRY WILLIAMS, in his official capacity as Secretary of Revenue of the Commonwealth of Pennsylvania,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a State-sanctioned restraint of trade is not actively supervised by State officials and thus fails to satisfy the requirements of the *Parker v. Brown* state-action doctrine, can the *Noerr-Pennington* doctrine nonetheless immunize the restraint and its implementation by State officials from judicial scrutiny under the Sherman Act — in effect allowing the *Noerr-Pennington* doctrine to swallow up the *Parker* rule?

2. If state regulation at the manufacturer level results in higher prices that are passed on to consumers, do consumers have standing to challenge the regulation's constitutionality under the Commerce Clause and Compact Clause, particularly when the manufacturers have expressly waived their right to challenge the regulation and voluntarily agreed to its terms?

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Petitioners Robert Mariana, Michael J. McFadden, Karen M. Moran, and Edward M. Nankervis ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 338 F.3d 189 and is reprinted in Petitioner's appendix (Pet. App.) at 1a. The opinion of the district court (Pet. App. 34a) is reported at 226 F. Supp. 2d 575.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 30, 2003. A timely petition for rehearing was denied on September 3, 2003. Pet. App. 61a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

> **Art. I, Section 8.** The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.
>
> **Clause 3.** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Art. I, Section 10. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

The Sherman Act

15 U.S.C. § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

State Statutes

The pertinent provisions of the Pennsylvania Tobacco Settlement Agreement Act 35 P.S. § 5672, *et seq.* are reproduced at Pet. App. 63a.

STATEMENT OF THE CASE

A. Procedural History

Petitioners, Pennsylvania consumers of tobacco products, commenced this action in the United States District Court, Middle District of Pennsylvania, pursuant to 28 U.S.C. § 1331, seeking declaratory and injunctive relief under the federal antitrust laws and the Constitution. Pet. App. 35a, 40-41a. Petitioners alleged that certain provisions of the multistate tobacco settlement agreement ("MSA") and the Pennsylvania Tobacco Settlement

Agreement Act, 35 P.S. § 5672, *et seq.* ("TSAA"), violate the Sherman Act, 15 U.S.C. § 1, and the Constitution's Commerce Clause and Compact Clause. Const., Art. I, § 8, cl. 3, Art. I, § 10. *Id.* Respondents, D. Michael Fisher and Larry Williams, are the Commonwealth officials responsible for implementing and enforcing the MSA and TSAA in Pennsylvania. Pet. App. 35a.

On appeal from the District Court's order and judgment dismissing Petitioner's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court of Appeals held that Petitioners' complaint indeed stated a claim for relief under the federal antitrust laws. Specifically, Petitioners sufficiently alleged that certain provisions of the MSA and TSAA — in particular, those that restrict competition by causing competitors of the major tobacco manufacturers to limit their output and raise prices — restrain trade in violation of the Sherman Act. Pet. App. 11a. With these restraints in place, and free from the competitive forces that otherwise would have prevailed in the marketplace, the major manufacturers (who negotiated the MSA and drafted the TSAA) were able to, and did, raise their prices to levels well in excess of that needed to fund their MSA payments. Pet. App. 40a. The Court of Appeals accepted Petitioners' allegations that the resulting price increases have been and continue to be passed on to consumers, including Petitioners, who have suffered injury to their person and property by reason of these antitrust violations. Pet. App. 4a.

The Court of Appeals also held that the restraints of trade contained in the MSA and TSAA, and Respondents' implementation and enforcement of them, do not satisfy the requirements of the state action doctrine enunciated by the Court in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. Pet. App. 26a. Petitioners alleged facts demonstrating that Respondents and State officials of the

remaining States that entered into the MSA do not actively supervise the private anticompetitive conduct made by possible by, and resulting from, these restraints of trade. Pet. App. 25a. Significantly, however, the Court of Appeals concluded that the *Noerr-Pennington*[1] immunity doctrine nonetheless precluded Petitioners from challenging the restraints under the Sherman Act. Pet. App. 19a-20a.

According to the Court of Appeals, the *Noerr-Pennington* doctrine shields Respondent Fisher from liability with respect to his petitioning of the Commonwealth courts to accept the MSA and the Pennsylvania legislature adopt the TSAA. *Id.* Respondent Fisher's *Noerr-Pennington* immunity, the Court of Appeals reasoned, must extend beyond such petitioning activity and serve also to immunize the restraints themselves as well as their implementation by Respondent Fisher, notwithstanding that the restraints and their implementation by Commonwealth officials fail to satisfy the state action doctrine. Pet. App. 17a-18a. The Court of Appeals observed: "If we were writing on a clean slate, we might find some logic in [Petitioners'] argument that conduct of private parties must be evaluated under *Noerr-Pennington* and that of government units under *Parker*. But the slate is not *tabula rasa*." Pet. App. 12a.

Petitioners' Commerce Clause and Compact Clause claims alleged in principal that the MSA and TSAA unlawfully interfere with the exclusive authority of Congress to regulate interstate commerce and to approve multistate compacts that tend to encroach upon the power of the federal government, including the power to regulate interstate commerce. Pet. App. 52a. As described in further detail

1. *Eastern R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

below, the purpose and effect of the MSA and TSAA's regulatory scheme was and is to regulate and unduly burden the entire interstate domestic tobacco market, which has caused consumers, including Petitioners, to pay exorbitant and uniformly higher prices — indeed, at levels far greater than that needed to fund the payments required under the MSA. *Id.*

Without reaching the substantive merits, and notwithstanding that the issue was never raised in the District Court or by Respondents on appeal, the Court of Appeals dismissed Petitioners' constitutional claims on jurisdictional grounds, finding that Petitioners alleged no concrete injury and merely alleged injury to competitors of the major manufacturers.[2] Pet. App. 30a-32a. In short, the Court of Appeals held that Petitioners do not have standing to raise their constitutional claims and affirmed the District Court's dismissal of these claims, accordingly.

Petitioners timely requested rehearing and rehearing *en banc* of the panel's decision. Pet. App. 61a-62a. Petitioners sought to bring to the attention of the Court of Appeals that the Panel's denial of standing on the constitutional claims conflicted with the decisions of the Court in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), and the decision of the Court of Appeals for the Six Circuit in *Huish Detergents, Inc. v. Warren Cty.*, 214 F.3d 707 (6th Cir. 2000). Petitioners also sought rehearing with respect to their Sherman Act claims. Since the establishment of the *Parker* state action

2. The District Court summarily held that Petitioners could prove no set of facts that the MSA violates the Commerce Clause or Compact Clause. The District Court, like the Court of Appeals, also concluded that Petitioners' constitutional challenges were directed solely at the MSA, not the TSAA.

doctrine and the Court's first acknowledgment of *Noerr-Pennington* immunity principles, no court has held that *Noerr-Pennington* immunity can shield from antitrust scrutiny a restraint of trade that fails to satisfy the requirements of the state action doctrine. The Court of Appeals denied Petitioners' request for rehearing on September 3, 2003. *Id.*

B. Pertinent Facts

In November 1998, forty-six states ("MSA States"), including the Commonwealth of Pennsylvania, and the four largest U.S. tobacco product manufacturers ("Majors") entered into the MSA.[3] Pet. App. 35a. Under the MSA, the Majors agreed to make multi-billion dollar annual settlement payments to the MSA States and, *inter alia*, curb certain of their pre-MSA marketing practices. Pet. App. 4a. In return for these concessions and as a condition to accepting the settlement, the Majors demanded that the MSA States, in turn, agree to limit the increased competition that the Majors would likely face subsequent to the MSA's execution, when they raised their prices to fund the MSA's annual payments. Pet. App. 37a-38a. Heeding the Majors' demands, the MSA was ultimately structured and drafted to include certain restraints of trade that Petitioners allege have the express purpose and effect of limiting competition from the Majors' competitors. *Id.*

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3. The Majors are Philip Morris Inc. ("Philip Morris"), R.J. Reynolds Tobacco Company ("RJR"), Brown & Williamson Tobacco Corp. ("B&W"), and Lorillard Tobacco Company ("Lorillard"). The MSA settled claims asserted by the MSA States that arose out of the Majors' alleged breaches of common law and statutory duty in connection with the sale and marketing of their products. Pet. App. 36a-37a.

Under the MSA's "Renegade Clause" provisions, manufacturers whose cigarettes were sold in the United States in 1997 or 1998 (other than the Majors) were given the *option* of joining the MSA and "settling" with the MSA States as "Subsequent Participating Manufacturers" or "SPMs," despite the fact that no MSA State had ever asserted a claim or brought suit against these manufacturers.[4] Pet. App. 4a. Recognizing that manufacturers that were never sued nor accused of any wrongdoing had little or no incentive to join the MSA, the MSA States and Majors offered SPMs an annual payment exemption under the MSA as an inducement to join. Pet. App. 5a-6a. To benefit fully from the payment exemption, however, the SPMs had to agree, in any year subsequent to 1998, not to exceed their respective pre-MSA market shares. Specifically, the Renegade Clause states that each SPM that entered into the MSA within ninety days of its execution date is not required to make any MSA payment to the MSA States, *provided the SPM's U.S. market share in any year subsequent to 1998 does not exceed 125% of its 1997 U.S. market share or 100% of its 1998 U.S. market share, whichever is greater. Id.*

In addition to the Renegade Clause, the Majors and MSA States also agreed to, and drafted, model legislation annexed as Exhibit "T" to the MSA, which was intended by the parties to be enacted (and has been enacted) in each of the MSA States. Pet. App. 38a-39a. In Pennsylvania, the model legislation was enacted as the TSAA. The TSAA and its model legislation counterparts in the remaining MSA States are commonly known as the "Escrow Statutes." The MSA recites that the purpose of the Escrow Statutes is to "effectively and fully neutralize[] the cost disadvantages that

4. The Majors are identified in the MSA as "Original Participating Manufacturers" or "OPMs."

the [Majors and SPMs] experience *vis-à-vis* Non Participating Manufacturers within each [MSA State] as a result of the provisions of [the MSA]." Pet. App. 4a-5a. A Non Participating Manufacturer ("NPM") under the MSA and TSAA is any tobacco product manufacturer that does not join the MSA as an OPM or SPM.

Under the TSAA, every manufacturer whose cigarettes are sold in Pennsylvania must join the MSA as an SPM, or remain an NPM and establish a Qualified Escrow Fund for Pennsylvania's benefit that must be funded annually based on the number of the NPM's cigarettes sold in the Commonwealth and nationally. Pet. App. 64a-66a. The minimum amount that an NPM must maintain in escrow under the TSAA for a given year is equal to that which Pennsylvania would have received from the NPM for that year had it joined the MSA as an SPM without a market share exemption. Pet. App. 66a. The funds deposited must be held for twenty-five years and can be accessed before then only by the Commonwealth, to satisfy a judgment that it might recover against the NPM on a Released Claim (defined in the MSA) in the event the Commonwealth sues the NPM and the NPM settles or is judicially determined to have acted culpably. Pet. App. 66a-67a.

In 1998, the Majors accounted for 96% - 98% of the U.S. market in cigarette sales. Pet. App. 2a. Confronted with the option of making annual payments as SPMs under the MSA only if they exceeded their market share exemption under the Renegade Clause, or alternatively making annual escrow payments under the Escrow Statutes based on every cigarette they sold, almost all of the remaining manufacturers in the U.S. market opted to join the MSA as SPMs. Pet. App. 39a. With the U.S. market, other than that portion possessed by the Majors, subject to the Renegade Clause's market share restrictions and "competition-

neutralizing" Escrow Statutes, the empirical effect of this regulatory scheme agreed to by the Majors and MSA States has been consistent conventional economic wisdom and traditional antitrust jurisprudence.

SPMs cannot maintain pre-MSA price levels for their generic cigarettes, in the face of the Majors' post-MSA price increases. If they do, the increased demand in their products *vis-a-vis* the Majors' products would cause these SPMs quickly to surpass their 1997-1998 market share caps under the Renegade Clause and, in turn, incur *pro rata* liability for the MSA's multi-billion dollar annual payments. Pet. App. 10a. Industry profit margins on generic cigarettes simply would not allow SPMs to absorb such liability without raising prices. Thus, SPMs are, and have been, forced to raise their prices post-MSA to levels that are choreographed and controlled solely by the Majors. *Id.* Similarly, the current escrow obligation of an NPM is approximately $.39 per pack, which corresponds to the approximate amount it would otherwise pay as an SPM under the MSA without an exemption. Pet. App. 65a-66a. The escrow payments (like the MSA payments of an SPM that exceeds its market share allocation) are greater than pre-MSA per pack profit levels for generic cigarettes. Thus, an NPM, too, must raise its prices if it wishes to stay in business. Pet. App. 38a. It cannot maintain pre-MSA price levels for its products and fund the escrow payments required by the TSAA. Thus, and by design, the foregoing regulatory scheme limits the output of the Majors' competitors and their ability to offer meaningful price competition in the face of the Majors' exorbitant price increases. Pet. App. 37a.

With the MSA and TSAA's restraints in place, the Majors have subjected consumers, including Petitioners, to unbridled price-gouging. For example, prior to the MSA's execution

on November 23, 1998, the parties to the MSA, including Respondent Fisher, projected that, in four years, the Majors would raise their price for cigarettes by $.35 - $.40 per pack, to finance their settlement payments under the MSA. Within just forty-eight hours of the MSA's execution, however, the Majors raised their prices in unison by $.45 per pack. Pet. App. 40a. To date, the anticompetitive restraints in the MSA and TSAA have allowed the Majors to raise their prices uniformly by more than $1.00 per pack — an amount greater than 300% of that which was and is necessary to finance their MSA payments, annually — all of which has been passed on to consumers, including Petitioners. Pet. App. 36a.

REASONS FOR GRANTING THE PETITION

1. The holding of the Court of Appeals with respect to the *Noerr-Pennington* doctrine, particularly given its findings with respect to state action, is unprecedented and in irreconcilable conflict with the decisions of this Court and other Courts of Appeals applying these antitrust immunity rules.

In a case that dealt with state regulation of wine producers and sellers, the Court, in *California Retail Liq. Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), struck down California legislation that failed to satisfy the requirements of the state action doctrine, because the State of California and, specifically, its officials did not actively supervise the anticompetitive conduct that the legislation sanctioned. The legislation effectively permitted wine producers to maintain higher wholesale prices and retail price levels for their products in the relevant market. The Court observed that the legislation provided for no oversight or mechanism through which State officials might pointedly reexamine, curb or control the anticompetitive conduct (price setting) that

resulted from the State's regulation, nor did State officials otherwise exercise such supervision or control.[5]

Significantly, the Court in *Midcal* did not hold or suggest that the California legislation was, or could be, immune from Sherman Act scrutiny simply because California wine producers petitioned the California Assembly to pass such legislation and were shielded from liability under the *Noerr-Pennington* doctrine with respect to their lobbying for the legislation. *See* Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 229 (2002 Supp.) (hereafter "*Areeda & Hovenkamp*"). Indeed, the fact that a person petitions a branch of state government to adopt regulation that restrains trade has never been grounds to immunize the regulation adopted, nor its subsequent implementation, particularly when anticompetitive conduct sanctioned by the regulation is not actively supervised by State officials and fails to satisfy the state action doctrine.

The *Noerr-Pennington* doctrine protects persons from liability when they petition a state government to adopt a restraint of trade; the state action doctrine — and only the

5. In *Midcal*, this Court established a two-pronged test that is to be applied when reviewing state regulation that permits or results in private anticompetitive conduct: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." 445 U.S. at 105 (internal quotes omitted). As the Court later explained, this test applies also to state officials regulating private parties. "The circumstances in which *Parker* immunity is available to . . . state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in [*Midcal*]. In that case, we were concerned, as we are here, with state regulation restraining competition among private parties." *Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 57-58 (1985).

state action doctrine — governs whether the restraint and its subsequent implementation by State officials is subject to judicial scrutiny under the Sherman Act. "*Parker* protects the States' act of governing, and *Noerr* the citizens' participation in government." *Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 383 (1991); *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 87 (9th Cir. 1982) (when state official and private parties are sued, liability of state official governed by *Parker*).[6] To hold otherwise, as the Court of Appeals did below in this case, would eviscerate the state action requirements of *Parker* and *Midcal*.

Moreover, that a state-sanctioned restraint of trade is embodied in a settlement agreement with a State official, rather than legislation, cannot change the relevant analysis or result. No exception to the two-pronged test established in *Midcal* exists for restraints adopted or agreed to in the context of a settlement, nor is there any sound policy reason for advocating in favor of such an exception. Indeed, a contrary rule would accord settlement agreements —

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6. *See also TFWS, Inc. v. Schaefer*, 242 F.3d 198, 204 (4th Cir. 2001) (state comptroller and other state officials enjoined from enforcing state regulations that failed active supervision test); *Nursing Registry, Inc. v. Eastern North Carolina Reg. Emer. Med. Servs.*, 959 F. Supp. 298 (E.D.N.C. 1997) (*Noerr-Pennington* and state action are analytically distinct; claims against private parties analyzed under *Noerr*, and claims against government officials analyzed under *Parker*); *Bright v. Ogden City*, 635 F. Supp. 31, 33 (D. Utah 1985) (state action doctrine and *Noerr-Pennington* doctrines are separate, and State may lack state action immunity even when private actors are immune from liability under *Noerr*); Philip E. Areeda & Herbert Hovenkamp, § 229 (2d ed. 2000) (*Noerr* governs petitioning of the government; *Parker* governs the subsequent governmental supervision of the restraint).

including those entered into with State officials — an immunity status greater than that accorded duly enacted state legislation, which is immune from scrutiny under the Sherman Act only if its satisfies the two-pronged test announced in *Midcal*. Immunizing a restraint of trade among private parties, as the Court of Appeals did in this case, based merely on the fact that a state official agreed to the restraint in the context of settling a lawsuit violates the long established rule that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351.[7]

2. Dismissal of Petitioners' constitutional challenges to the MSA and TSAA on standing grounds flies in the face of the Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and similar Circuit Court precedent acknowledging that consumers who pay higher prices as a result of unconstitutional state regulation suffer injury that is within the 'zone of interests' protected by the Commerce Clause.

In holding that Petitioners as consumers lacked standing to challenge the constitutionality of certain provisions of the MSA and TSAA, the Court of Appeals construed Petitioners to be interposing a claim derivative to that of SPMs and NPMs who are restrained from increasing output or lowering

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7. *See also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). "Of course, a consent judgment [and settlement agreement], even one entered at the behest of the Antitrust Division, does not immunize [defendants] from [antitrust] liability for actions, including those contemplated by the [consent] decree, that violate the rights of nonparties." 441 U.S. at 13.

their prices in the relevant market. Thus, the Court of Appeals ruled:

> [Petitioners] do not complain that the MSA's payment structure injures them as smokers. Because [Petitioners] are not asserting their own legal interests but instead those of third parties — here the SPMs and NPMs — they are not analogous to the plaintiffs in *Oxford Assocs.* [*v. Waste System Auth.*, 271 F.3d 140 (3d Cir. 2001)], who alleged that they personally were injured by the fee structure at issue in that case.

Pet. App. 31a.

In reaching the foregoing conclusion, the Court of Appeals disregarded that "[a]t the pleading stage, general factual allegations of injury . . . may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks and citation omitted). In this regard, Petitioners' allegations of injury derive not from the injury suffered by SPMs and NPMs but, rather, the injury Petitioners suffered and continue to suffer in their own right by reason of having to pay higher prices resulting from the subject state regulation.

The Court in *Tracy* made it abundantly clear that "cognizable injury from unconstitutional [regulation of] interstate commerce does not stop at members of the class . . . whom a State ultimately [regulates], and customers of that class may also be injured." 519 U.S. at 286; *see also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (wholesalers had standing to raise Commerce Clause challenge to Hawaii tax regime, although wholesalers were

not among class of out-of-state liquor producers allegedly burdened by Hawaii's law). The rationale and decision in *Tracy* affording standing to consumers to challenge the constitutionality of state regulation at the producer level has been followed also by the Court of Appeals for the Six Circuit, in *Huish Detergents, Inc. v. Warren Cty.*, 214 F.3d 707 (6th Cir. 2000), and should have been adhered to in this case.

Much like the individual waste generators in *Huish*, Petitioners alleged directly and not through conjecture that *they* pay higher prices for products because of the undue and direct burden the MSA and TSAA places on interstate commerce. Petitioners' injury is not derivative of SPMs or NPMs, particularly insofar as Petitioners' injury stems from the price increases instituted by the *Majors* that resulted from the subject regulation. Moreover, in interpreting these facts to reflect that Petitioners are asserting the legal interest of SPMs, the decision below fails to accord with the fact that SPMs who stay within their market allocation — and those (similar to NPMs) who simply pass on the cost of the regulation — have no economic interest in challenging the constitutionality of the MSA or TSAA and, more importantly, expressly waived their right to challenge the constitutionality of the MSA.

In cases such as this involving a constitutional claim, a plaintiff must satisfy two tests for standing: first, it must meet basic Article III constitutional requirements; and second, the plaintiff's injury must fall within the 'zone of interests' protected by the constitutional guarantee. To establish Article III standing, a plaintiff must demonstrate: (1) an injury in fact that is actual or threatened; (2) a causal connection between the defendants' conduct and the alleged injury; and (3) a substantial likelihood that the injury will be redressed

by a favorable decision. *Lujan*, 504 U.S. at 560-61. Petitioners have alleged each of the required elements for standing under Article III, and the Court of Appeals should not have found otherwise. Petitioners "alleged an actual injury as a result of the [Commonwealth's TSAA] and agreement with [the Majors and SPMs], in consequence of which [Petitioners are] forced to pay [the Majors, SPMs and NPMs] more to [purchase their products] than [Petitioners] would spend if [they] could purchase" these products without the infringing regulation. *Huish*, 214 F.3d at 710.

Petitioners also satisfy the prudential limitations on standing, by showing that the interest they seek to protect "arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). In this case, the constitutional guarantees at issue arise under the Commerce Clause and Compact Clause, which are designed to prevent States from regulating interstate commerce and from overarching and encroachment upon the federal government's supremacy in this area. The Commerce Clause protects not only producers, but also consumers like Petitioners who "'may look to the free competition from every producing area in the Nation to protect [them] from exploitation by any.'" *Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (quoting *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949)).

Petitioners allege that forty-six States have entered into a multistate agreement and enacted model legislation that expressly regulates tobacco sales in all fifty States. A manufacturer whose products are sold in Pennsylvania must enter into a settlement agreement with the Commonwealth and forty-five other States, pursuant to which it must pay all

forty-six States damage payments based on its sales nationwide. Pet. App. 64a. Alternatively, the manufacturer must make annual escrow payments based on what it would have paid the Commonwealth had it joined the MSA, *i.e.*, again, based on its sales nationwide — not just in Pennsylvania. Pet. App. 66a. Thus, and by design, a manufacturer selling its products in Pennsylvania must take into account not only the prices it can charge in the Commonwealth but, rather, its sales in each and every State and the affect of such sales on its MSA or escrow liability to Pennsylvania. The clear purpose and effect of such regulation is to burden and regulate interstate commerce in and among the fifty States, and the unequivocal result is higher prices passed on to consumers, including Petitioners. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *Brown-Forman Dist. Corp. v. New York State Liq. Auth.*, 476 U.S. 573, 582-83 (1986). Petitioners submit that their injury in the form of higher prices resulting from this regulation is well within the zone of interests protected by the Commerce Clause and Compact Clause. *See Tracy*, 519 U.S. at 286-87.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DECIDED JULY 30, 2003

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 02-2906

Robert MARIANA; Michael J. McFadden; Karen M. Moran; Edward M. Nankervis,

Appellants

v.

D. Michael FISHER, in his official capacity as Attorney General of the Commonwealth of Pennsylvania; Larry Williams, in his official capacity as Secretary of Revenue of the Commonwealth of Pennsylvania.

Argued March 12, 2003

Decided July 30, 2003

Before: SLOVITER, NYGAARD, and ALARCÓN,* Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

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* Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appendix A

This appeal presents us with yet another round of litigation surrounding the multi-billion dollar national tobacco settlement, known as the Master Settlement Agreement ("MSA").[1] In 1998, the M.S.A. was entered into between 46 States and the four largest domestic tobacco companies that together made 98% of cigarette sales in the United States at that time, referred to as the "Majors."[2] Plaintiffs Robert Mariana, Michael McFadden, Karen Moran and Edward Nankervis, all Pennsylvania residents who smoke cigarettes, filed suit claiming that certain provisions of the M.S.A. violate Section 1 of the Sherman Act, 15 U.S.C. § 1, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Compact Clause, U.S. Const. art. I, § 10, cl. 3, of the United States Constitution.

In their complaint, Plaintiffs sued Larry Williams, Pennsylvania's Secretary of Revenue, and Michael Fisher,

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1. This suit is just one in a series attacking the M.S.A. § and statutes passed pursuant to it. Thus far, these suits have been unsuccessful. *See Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818, 123 S.Ct. 93, 154 L.Ed.2d 24 (2002); *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir.2001), *cert. denied*, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179 (C.D.Cal.2000); *Hise v. Philip Morris Inc.*, 46 F.Supp.2d 1201 (N.D.Okla.1999), *aff'd mem.*, 208 F.3d 226 (10th Cir.), *cert. denied*, 531 U.S. 959, 121 S.Ct. 384, 148 L.Ed.2d 296 (2000); *Forces Action Project LLC v. California*, No. C99-0607 MJJ, 2000 WL 20977 (N.D.Cal. Jan.5, 2000), *aff'd in part, rev'd in part*, 16 Fed.Appx. 774 (9th Cir.2001).

2. The Majors consist of Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard Tobacco.

the Attorney General of Pennsylvania in their official capacities. We note that the Majors are not named defendants in this particular litigation as this court concluded in an earlier decision that the Majors were immune from antitrust liability under the *Noerr-Pennington* doctrine. *See A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*, 263 F.3d 239 (3d Cir.2001), *cert. denied*, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002).

The District Court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and Plaintiffs appeal.

I.

FACTS AND PROCEDURAL HISTORY

A comprehensive history of the M.S.A. can be found in *Bedell* and will be repeated here only to the extent necessary for the discussion and analysis. The M.S.A. was negotiated after various lawsuits were either brought or threatened against the Majors and other tobacco companies by States seeking to recover Medicaid funds that they spent to treat tobacco-related diseases. Pennsylvania filed suit against the Majors in April 1997 and the suit was settled as part of the MSA.[3]

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3. Initially, the States and the Majors asked Congress to resolve the suits through a national legislative remedy. The M.S.A. was executed by the parties only after congressional efforts failed. *Bedell*, 263 F.3d at 241.

Appendix A

Under the MSA, the Majors agreed to pay the settling States billions of dollars and to restrict their marketing of cigarettes, one of the practices complained about in the States' lawsuits. In return, the M.S.A. included provisions designed to enable the Majors to transfer billions of dollars to the States, provisions that the Plaintiffs allege were to be funded by the payment by wholesalers and consumers of artificially high prices for cigarettes. Plaintiffs further contend that after the M.S.A. was entered into, the prices charged by the Majors have generated revenue much greater than needed to fund the M.S.A. and have enabled the Majors to spend record amounts on advertising.

After the execution of the MSA, additional tobacco manufacturers representing 2% of the market joined the settlement as Subsequent Participating Manufacturers ("SPMs"). That joinder meant that nearly all of the domestic cigarette producers had signed the MSA. *Bedell*, 263 F.3d at 243.

The addition of the SPMs was significant, as the Majors allegedly had feared that cigarette manufacturers who had been left out of the M.S.A. would be able to expand their market share or enter the market by offering lower prices. *Id.* The M.S.A. is explicit that its purpose is to reduce the ability of non-signatory cigarette manufacturers to gain market share due to the competitive advantage gained by not contributing to the multi-billion dollar settlement. *Id.* at 246. Indeed, the M.S.A. declares that it "effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating

Manufacturers with such Settling States as a result of the provisions of this Agreement." MSA § IX(d)(2)(E).

On January 10, 2002, Plaintiffs filed this suit against the Pennsylvania Attorney General and the Secretary of Revenue, in their official capacities, seeking injunctive relief from the continued implementation, enforcement and performance of the M.S.A. on behalf of Pennsylvania. Plaintiffs claim that a major objective of the M.S.A. is to prevent SPMs and Non-Participating Manufacturers ("NPMs") from expanding their market share and to prevent new or potential competitors from entering the market. Specifically, they challenge the MSA's so-called "Renegade Clause," the settlement's primary mechanism for allocating payment responsibilities based on production levels, and the MSA's provision calling for enactment by the settling States of "Qualifying Statutes," laws requiring NPMs to make payments into state escrow accounts for each sale made. *See Bedell*, 263 F.3d at 243. Pennsylvania's Qualifying Statute, the Tobacco Settlement Agreement Act ("TSAA"), 35 Pa.Stat. § § 5672-5674 (2003), requires each NPM either to become a signatory to the M.S.A. as an SPM or to make payments into an escrow account fund to be held to pay any judgment or settlement that the Commonwealth secures in subsequent litigation against the NPM. 35 Pa. Cons.Stat. § 5674(a) and (b)(1). The payments are to be returned to the NPM after 25 years if they are not needed to pay judgments or settlements. 35 Pa. Cons.Stat. § 5674(b)(3).

The Renegade Clause provides that the SPM need not make payments to the States under the M.S.A. as long as the market share of an SPM does not exceed the greater of its

1998 market share or 125% of its 1997 market share. MSA IX(I). This mechanism allegedly discourages SPMs from underpricing the Majors to increase their market share, even if they could do so efficiently. *See Bedell*, 263 F.3d at 244. This provision, the Plaintiffs claim, effectively puts a market share cap on SPMs and restricts their output.

Similarly, if NPMs, including potential new entrants into the market, gain market share, thereby reducing the Majors' market share, the Majors may decrease their payments to the settlement fund. *Bedell*, 263 F.3d at 244. The Qualifying Statute requires that the NPMs choose between joining the MSA, thereby subjecting themselves to the same restrictions on market share as SPMs, or be subject to tobacco related lawsuits for which they must make payments into the State established escrow account for any potential adverse judgments. *Id.* at 246. The M.S.A. § also creates a $50 million Enforcement Fund provided by the Majors to investigate and sue NPMs to enforce the settlement. *Id.* at 245-46.

According to Plaintiffs, economics force SPMs to join the scheme while new entry is precluded. This enables the Majors to cling to their 98% market share, thereby creating an unregulated cartel. Plaintiffs claim that this output cartel has allowed and continues to allow the Majors to raise prices to artificially high and supracompetitive levels without fear of significant competition and without any monitoring, regulation, or active supervision by the States. In fact, Plaintiffs allege that since the execution of the MSA, the Majors have raised wholesale prices of cigarettes by nearly 60% while losing less than 5% of their market share. This, according to Plaintiffs, is a violation of the Sherman Act.

Finally, Plaintiffs allege that the M.S.A. violates the Commerce and Compact Clauses of the U.S. Constitution.

In dismissing the antitrust claims asserted in the complaint, the District Court held that in light of *Bedell*, Defendants, like the Majors, enjoy *Noerr-Pennington* immunity. It further found that Plaintiffs could prove no set of facts that would establish violations of the Commerce and Compact Clauses of the United States Constitution. Plaintiffs timely appealed. Forty states, the District of Columbia, and the Northern Mariana Islands, all parties to the MSA, have filed an amicus brief urging us to affirm the order of the District Court.

II.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. We exercise de novo review over the dismissal of claims under Federal Rule of Civil Procedure 12(b)(6). *Bedell*, 263 F.3d at 249 n. 25. Furthermore, we must take all factual allegations and reasonable inferences as true and view them in the light most favorable to Plaintiffs. *Id.* The District Court properly dismissed Plaintiffs' complaint only if Plaintiffs could have proved no set of facts entitling them to relief. *Id.*

Appendix A

III.

ANTITRUST CLAIM

As an initial matter, we consider whether Plaintiffs properly have stated a cause of action under the Sherman Act.[4] Defendants argue that Plaintiffs fail to state a claim as the M.S.A. does not establish an output cartel in violation of the Sherman Act. The vigor with which Defendants argued this issue came as a surprise to us as *Bedell* clearly forecloses their argument. *See Bedell*, 263 F.3d at 249-50. During oral argument, Attorney General Fisher, who argued on behalf of both Defendants, conceded that the facts and allegations in this case are "virtually similar" to those in *Bedell.* Tr. of Oral Argument, Mar. 12, 2003, at 20. Nonetheless, he contended that the *Bedell* court based its findings on the *Bedell* plaintiffs' characterization of the M.S.A. rather than the M.S.A. itself. According to General Fisher, we must consider both Plaintiffs' allegations and the M.S.A. itself. This, however, is precisely what the *Bedell* court did as evidenced by the various times it quoted actual sections of the MSA. *E.g.*, *id.* at 244 nn. 17-19. Even a cursory reading of *Bedell* discredits Defendants' argument, which we now reject. Thus, it is to *Bedell* itself that we now turn.

Plaintiff in *Bedell* was a cigarette wholesaler that brought a class action suit against the Majors on behalf of itself and 900 similarly situated wholesalers. Like the Plaintiffs in the

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4. Under § 1 of the Sherman Act, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1.

case before us, the *Bedell* plaintiffs alleged that the MSA's Renegade Clause and Qualifying Statutes created an output cartel, thereby violating the Sherman Act. The district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the plaintiffs appealed. Before reaching the defendants' arguments on immunity, this court considered — and rejected — the argument that the terms of the M.S.A. do not constitute an agreement to limit output in violation of the antitrust laws. We stated: "An agreement which has the purpose and effect of reducing output is illegal under § 1 of the Sherman Act." *Id.* at 247. We cited *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 777, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999), where the Court discussed the effects of anticompetitive output restrictions and *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), where the Court stated that "the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade."

We noted further,

> The Court has made clear that a pure restriction on output is anticompetitive and in the absence of special circumstances, would violate the antitrust laws. *NCAA*, 468 U.S. at 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (recognizing that output restrictions may be permissible if required in order to market the product at all). By limiting production, the cartel is able to raise prices above competitive levels.

Bedell, 263 F.3d at 248.

We pointed out that the Federal Trade Commission/ Department of Justice Guidelines also recognize that agreements to reduce output violate the antitrust laws. *Id.* Applying those general principles to the MSA, we stated,

> Plaintiffs allege the agreement between the States and the Majors purposefully creates powerful disincentives to increase cigarette production. Although the Multistate Settlement Agreement contains no explicit agreement to raise prices or restrict market share, any signatory who increases production beyond historic levels automatically will increase its proportionate share of payments to the Multistate Settlement Agreement. Normally, a company which lowers prices would be expected to increase market share. But the penalty of higher settlement payments for increased market share would discourage reducing prices here. For this reason, signatories have an incentive to raise prices to match increases by competitors. It appears this incentive structure has proven true. The Majors' prices increased dramatically and simultaneously after signing the Multistate Settlement Agreement.

Id. at 248-49.

After noting that plaintiffs had alleged that defendants formed an output cartel through the M.S.A. that restricts production and effectively bars entry to the cigarette tobacco

market and that the defendants injured the tobacco wholesalers by charging artificially high prices, the court, speaking through Judge Scirica, stated, "[w]e *hold* that plaintiffs have properly pleaded an antitrust violation by alleging defendants agreed to form an output cartel through the [MSA] that violates § 1 and § 2[ ] of the Sherman Antitrust Act." *Id.* at 249-50 (emphasis added) (footnote omitted). That was the *holding* of the court and General Fisher's attempt to argue to the contrary is without basis. The holding was critical to our conclusion as to immunity. Without having held that plaintiffs properly pleaded a claim under the Sherman Act, the *Bedell* court would never have reached the immunity issue. Not only are we bound by the *Bedell* court's holding that the allegations of an output cartel created by the M.S.A. and resulting Qualifying Statutes state a claim for a violation of the Sherman Act, but we reaffirm the legal proposition. We turn therefore to the question whether Defendants are immune under either the *Noerr-Pennington* or the state action — also known as the *Parker* — doctrine.

IV.

ANTITRUST IMMUNITY

Having concluded that Plaintiffs sufficiently state an antitrust claim in that the M.S.A. creates an output cartel that on its face violates the Sherman Act, we consider Defendants' argument that their conduct is immunized from liability. In dismissing Plaintiffs' suit against the Pennsylvania officials, the District Court held that the State officials were entitled to immunity on the basis of the *Noerr-Pennington* doctrine and predicted, on the basis of the

language in *Bedell*, that they would not be entitled to *Parker* immunity. The Plaintiffs argue that the court erred. They posit that a State's implementation and enforcement of a restraint of trade it has adopted or sanctioned is governed by the state action, and not the *Noerr-Pennington*, immunity doctrine. Plaintiffs argue that the state action doctrine fails to shield Defendants from antitrust liability in this case.

Defendants, on the other hand, claim that they are immune from antitrust liability under both the *Noerr-Pennington* and *Parker* doctrines. If we were writing on a clean slate, we might find some logic in Plaintiffs' argument that the conduct of private parties must be evaluated under *Noerr-Pennington* and that of government units under *Parker.* But the slate is not *tabula rasa.*

We consider each immunity doctrine in turn.

A. *Noerr-Pennington* Immunity

In *Bedell*, we concluded that although plaintiffs had properly pleaded an antitrust injury, the *Noerr-Pennington* immunity doctrine nonetheless shielded the Majors from liability, thereby making it appropriate for the district court to dismiss plaintiffs' complaint under Rule 12(b)(6). 263 F.3d at 266-67. The narrow question before us, then, is whether that same immunity extends to the other party to the M.S.A. — the state actors. Here, those actors are Defendants Fisher and Williams. Under the *Noerr-Pennington* doctrine, " '[a] party who petitions the government for redress generally is immune from antitrust liability.' " *Id.* at 250

(citation omitted). That immunity is so potent that it protects petitioning notwithstanding an improper purpose or motive. *Id.*

The doctrine was first established in *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), where the Court held that the Sherman Act is not violated simply by attempts by private parties to influence the passage or enforcement of laws favorable to the petitioner despite the anticompetitive effects of those laws. Several years later in *United Mine Workers v. Pennington*, the Court reaffirmed that decision, holding that *"[j]oint* efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. 657, 670, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) (emphasis added).

The dual principles underlying the *Noerr-Pennington* doctrine are the constitutional right to petition under the First Amendment and the importance of open communication in representative democracies. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The *Noerr* Court explained:

> In a representative democracy such as this, [the legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold,

> at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act[ ].

365 U.S. at 137, 81 S.Ct. 523 (footnote omitted). Thus, *Noerr-Pennington* immunity shields actions that might otherwise violate the Sherman Act because " '[t]he federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government.' " *Bedell*, 263 F.3d at 250-51 (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991)).

Highlighted as particularly relevant in *Bedell*, and equally relevant to us here, is the recognition that parties are immune from liability arising from the antitrust injuries caused by government action resulting from the petitioning. 263 F.3d at 251. Thus, if the conduct constitutes valid petitioning, the petitioner is immune from antitrust liability whether or not the injuries stem from the actual act of petitioning or from the government action resulting from the petitioning. *Id.*

In *Bedell*, we noted the district court's finding that negotiating the M.S.A. "was akin to petitioning the government" and we agreed that "defendants engaged in petitioning activity with sovereign states . . . are immune under the *Noerr-Pennington* doctrine[ ]." *Id.* at 252 (footnote omitted). We recognized that other courts have also reached this conclusion. *Id.* at 252 n. 31 (citing *Hise v. Philip Morris*

Inc., 46 F.Supp.2d 1201, 1206 (N.D.Okla.1999), *aff'd mem.*, 208 F.3d 226 (10th Cir.2000); *Forces Action Project LLC v. California*, No. C99-0607 MJJ, 2000 WL 20977, at *8 (N.D.Cal. Jan.5, 2000); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1193 (C.D.Cal.2000)). Acknowledging plaintiffs' contention that a motivating purpose behind the M.S.A. was to create a cartel with its attendant supra-competitive profits and that the States were motivated by a desire to share in these profits, we nonetheless stated that "the parties' motives are generally irrelevant and carry no legal significance [ ]." *Id.* at 253 (footnote omitted) (citing *Noerr*, 365 U.S. at 138, 81 S.Ct. 523). Instead, we noted that the petitioning invoked the States' traditional powers to regulate the health and welfare of their citizens. *See id.* Accordingly, in *Bedell* we granted *Noerr-Pennington* immunity to the Majors. *Id.* at 254.

As noted previously, Plaintiffs argue that *Noerr-Pennington* immunity is applicable to shield private parties but that it is inapplicable to Defendants because immunity for state actions, if any, must be found in the state action doctrine that applies to a State's implementation and enforcement of an antitrust injury under the Supreme Court's decision of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The District Court concluded that by instituting a lawsuit on behalf of Pennsylvania against the tobacco companies, Defendant Fisher was petitioning the courts " 'to recover damages which the Commonwealth and its citizens have sustained as a result of the unlawful and concerted actions of the [tobacco companies].' " *Mariana v. Fisher*, 226 F.Supp.2d 575, 582 (M.D.Pa.2002) (citation omitted). Because the M.S.A. arose from a petition in

proceedings before "other governmental agencies authorized to resolve such issues," Defendants were entitled to *Noerr-Pennington* immunity. *Id.*

In support of that conclusion, we note that Defendant Fisher was among the dozens of Attorneys General across the country who filed suit against the tobacco companies, effectively petitioning the judiciary. In *Trucking Unlimited*, the Supreme Court made explicit that the *Noerr-Pennington* doctrine immunizes petitioning directed at any branch of government, including the executive, legislative, judicial, and administrative agencies. 404 U.S. at 510, 92 S.Ct. 609. In *Bedell*, we held that the settlement that arose from the tobacco lawsuits was petitioning for *Noerr-Pennington* purposes. 263 F.3d at 252.

Plaintiffs argue that *Noerr-Pennington* immunity cannot apply because petitioning immunity cannot apply to a public entity. They provide no persuasive authority. In the one case they cite, *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1086 (5th Cir.1988), the plaintiff did not seek to impose liability on the defendant city based on petitioning activity but instead sued the city based on its own zoning enforcement decisions. Thus, the statement in that opinion that "it is impossible for the government to petition itself," *id.*, hardly serves as authority for us. More important, this court in *Herr v. Pequea Twp.*, 274 F.3d 109, 119 n. 9 (3d Cir.2001) (questioned on other grounds by *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir.2003)), rejected the proposition in *Video Int'l* that petitioning immunity cannot apply to a public entity.

Appendix A

In *Herr*, a land developer sued a township and three of its supervisors alleging that the township violated his substantive due process rights through a campaign to obstruct his development project. 274 F.3d at 110. The action of the government defendants was participation in proceedings before various courts and the Lancaster County Planning Commission, the Department of Environmental Review, the Environmental Hearing Board, and the Zoning Hearing Board. *Id.* Although *Herr* involved constitutional claims, not an antitrust claim, we stated that the *Noerr-Pennington* doctrine was not limited to the antitrust arena, *id.* at 116, and concluded, over a dissent, that the government officials were entitled to *Noerr-Pennington* immunity as public officials sued in their individual capacities. *Id.* at 119. We acknowledged that we could not find a case addressing whether a municipal corporation is entitled to such immunity, but "predict[ed] . . . that the Supreme Court would hold that it is." *Id.* Although the dissent in *Herr* relied on *Video Int'l*, the majority distinguished it because it did not involve a situation, as in *Herr*, where the plaintiff sought to impose liability on a municipality for petitioning a distinct public entity authorized by state law to resolve land planning issues. *Id.* at 119-20 n. 9.

Plaintiffs argue that unlike *Herr*, this action does not implicate Defendants' petitioning activity and they do not seek to recover damages, but only an injunction against Defendants in their official capacities. But the basis for their claim is that the M.S.A. is a contract or combination that violates the Sherman Act. If the government officials have *Noerr-Pennington* immunity for entering into the MSA, that immunity must extend to complying with and enforcing

its provisions. Like the defendants in *Herr*, Defendants in the current case petitioned governmental entities authorized to resolve the pertinent issues — here the courts and the legislature — in an attempt to advance the goals of Pennsylvania residents. In *Bedell*, we found the Majors' participation in the settlement agreement to be petitioning. 263 F.3d at 252. If the Majors' role in that agreement is petitioning, the role of the state actors, who actually initiated the chain of events leading up to the M.S.A. by initiating the lawsuit and lobbying the legislature, surely must be petitioning.

Although *Noerr-Pennington* immunity typically applies to private, not public, actors, this would not be the first time an appellate court has applied such immunity to public actors. Both the Ninth and Second Circuit Courts of Appeals have extended *Noerr-Pennington* immunity to government actors. *See, e.g., Manistee Town Center v. City of Glendale*, 227 F.3d 1090 (9th Cir.2000); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir.1980). In *Miracle Mile*, the Second Circuit held that the City of Rochester's petitions to state and federal agencies opposing expansion of a regional shopping center were immunized under *Noerr-Pennington* without a discussion of the public versus private dichotomy. *Id.* at 20-21. However, the Ninth Circuit examined the issue in some detail in *Manistee.*

Plaintiff, Manistee Town Center, purchased and renovated a rundown shopping mall. *Manistee*, 227 F.3d at 1091. When unsuccessful in attracting major retail tenants to the mall, the plaintiff began to explore alternative lease arrangements which were opposed by defendants, the City of Glendale and the Mayor, City Manager, and two City

Council members. *Id.* Defendants sought to prevent the plaintiff's efforts to lease space to certain lessors by encouraging residents and the local press to vocally oppose non-commercial use of the space and by lobbying government officials of the County. *Id.* at 1092. When Manistee Town Center's lease arrangements fell through, it filed a complaint against defendants, in their official capacities, pursuant to 42 U.S.C. §§ 1983 and 1985. *Id.* The district court dismissed plaintiff's § 1983 claim on *Noerr-Pennington* immunity grounds. *Id.*

In affirming the dismissal, the Ninth Circuit acknowledged that the applicability of *Noerr-Pennington* immunity to government actors was a "question of first impression." *Id.* at 1093. The court reasoned that extending such immunity to state actors is consistent with the "representative democracy" rationale enunciated by the Supreme Court in *Noerr*, as "[g]overnment officials are frequently called upon to be ombudsmen for their constituents" whereby "they intercede, lobby, and generate publicity to advance their constituents' goals." *Id.* In holding that *Noerr-Pennington* immunity extended to defendants, the court concluded that this form of petitioning is "nearly as vital" to democracy as petitioning by private citizens. *Id.*

We know of no Supreme Court or federal appellate case holding that *Noerr-Pennington* cannot apply to government actors, and are persuaded by the reasoning employed by the *Manistee* court. Governmental petitioning is as crucial to the modern democracy as is that of private parties. Accordingly, we agree with the District Court that by instituting a lawsuit against the tobacco companies on behalf of the

Commonwealth and lobbying the legislature to pass the TSAA, Defendants engaged in petitioning activities that qualify for *Noerr-Pennington* immunity.

Noerr-Pennington immunity notwithstanding, Defendants argue that they are also eligible for the state action immunity recognized by the Supreme Court 60 years ago in *Parker*. Thus, we consider Defendants' claims as to *Parker* immunity.

B. *Parker* Immunity

Defendants argue with considerable vigor that they also are entitled to state action immunity stemming from the Supreme Court's decision in *Parker*. Plaintiffs counter that because the *Bedell* court found no *Parker* state action immunity for the Majors, we are bound to find no *Parker* immunity for the States.

It is indeed true that this court strictly adheres to its Internal Operating Procedure 9.1 which provides: "It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so." It is also well established that a subsequent panel is not bound by dictum in an earlier opinion. *See, e.g.*, *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 375-76 (3d Cir.2003).

In *Bedell*, once we held that the Majors were immune from antitrust liability under the *Noerr-Pennington* doctrine,

we recognized that "our analysis could end here." Nonetheless, we continued by stating, "[b]ut the District Court found *Parker* immunity, so we will address it as well." 263 F.3d at 254. From this comment, one may deduce we recognized that our subsequent discussion on *Parker* immunity was unnecessary to the holding in *Bedell* and that arguably the state action discussion was dicta. If *Bedell* had concluded that the Majors were immune under the *Parker* doctrine as well as under *Noerr-Pennington*, it would have been an alternate ground for the holding, and therefore not dicta. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir.1982) ("We note first that an alternate holding has the same force as a single holding; it is binding precedent."). But *Bedell* did not so conclude. 263 F.3d at 266. We therefore turn once again to our opinion in *Bedell* to examine whether its rejection of the applicability of *Parker* immunity for the Majors was dicta or whether it binds us to reject *Parker* immunity for the State Defendants.

In *Bedell*, we embarked on a thorough discussion of the rationale and scope of the *Parker* immunity doctrine. We rescribe only the highlights of that discussion. We characterized as well established that "[a]ntitrust laws do not bar anticompetitive restraints that sovereign states impose 'as an act of government.' " *Id.* at 254 (quoting *Parker*, 317 U.S. at 352, 63 S.Ct. 307). In *Parker*, the Supreme Court held that the California Agriculture Prorate Act, a state statute restricting competition among food producers in California by imposing a market sharing scheme, did not violate the Sherman Act. 317 U.S. at 352, 63 S.Ct. 307. Since then, the Court has consistently held that the federal antitrust laws are subject to supersession by state

regulatory programs. *See, e.g., FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-33, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992).

The *Parker* doctrine is grounded in federalism and respect for state sovereignty. *Bedell*, 263 F.3d at 254. As explained in *Bedell*, the "interest in protecting the acts of the sovereign state, even if anticompetitive, outweighs the importance of a freely competitive marketplace." *Id.* at 254-55. Therefore, clear congressional intent is required before a federal law will be held to invalidate state programs because "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351, 63 S.Ct. 307.

As we acknowledged in *Bedell*, "[w]hen a state clearly acts in its sovereign capacity it avoids the constraints of the Sherman Act and may act anticompetitively to further other policy goals." 263 F.3d at 255. For example, in *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984), the Court considered the claim of an unsuccessful candidate for admission to the Arizona Bar that the members of Arizona's admissions committee violated the Sherman Act by "artificially reducing the numbers of competing attorneys in the State." *Id.* at 565, 104 S.Ct. 1989 (quotation omitted). The Court held that defendants' actions with regard to the bar examination grading formula could not be divorced from the Arizona Supreme Court's exercise of its sovereign power, and thus defendants were immune under *Parker*. *Id.* at 570-73, 104 S.Ct. 1989. It cautioned, however, that conduct that is not directly that of the state legislature and judiciary requires "closer analysis" for purposes of *Parker* immunity

"to ensure that the anticompetitive conduct of the State's representative was contemplated by the State" itself. *Id.* at 568, 104 S.Ct. 1989. In *Bedell*, we stated that when it is uncertain whether we should treat an act as state action because it has been neither approved nor authorized by the State, courts should apply the two-pronged test enunciated by the Supreme Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). 263 F.3d at 259.

To qualify as state action under the *Midcal* test, the challenged restraint must, first, be one that is " 'clearly articulated and affirmatively expressed as state policy,' " and, second, the resulting antitrust violation must be " 'actively supervised' " by the State. *Id.* at 104, 100 S.Ct. 937 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)). In *Bedell*, we recognized that it is unnecessary to undertake a *Midcal* analysis if the alleged antitrust injury was the direct result of a clear sovereign state act. 263 F.3d at 256.

Illustrative is our decision in *Massachusetts Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir.1997), a case in which an unaccredited law school that failed to receive accreditation filed an antitrust suit against the American Bar Association ("ABA") alleging a group boycott. We reasoned that any potential antitrust injury arising from the inability of plaintiff's graduates to take bar examinations was the result of state action because it is the State, and not the ABA, that makes the decision as to bar admissions. *Id.* at 1036. We concluded that because the States are sovereign in imposing the bar admission requirements,

the ABA was immune from liability under *Parker*, and the *Midcal* test urged by plaintiff was inapplicable. *Id.* at 1036.

Nonetheless, in *Bedell* we did apply the *Midcal* test. Although we recognized that "one could find direct state action foreclosing the application of *Midcal*" because the M.S.A. "was a negotiated settlement by State Attorneys General, and the state legislatures were responsible for passing the Qualifying Statutes to enforce important components of the agreement," we stated, "it would appear that ... the anticompetitive injury here resulted from the tobacco companies' conduct after implementation of the [MSA], and not from any further positive action by the States." *Bedell*, 263 F.3d at 257-58.

Because this court in *Bedell* examined precisely the same facts and the same documents and concluded that we must apply the *Midcal* test, we believe we are not free to decide to the contrary.

In applying *Midcal's* first prong, we concluded that "it is evident the Multistate Settlement Agreement was backed by clearly articulated state policy. [ ]" *Id.* at 260 (footnote omitted). We believe that conclusion is unassailable and, of course, it applies equally in this case. It was our analysis of the second *Midcal* prong that led us to conclude that the Majors were not entitled to *Parker* immunity. In that connection, we stated that "[t]he essential inquiry of the 'actively supervised' prong is to determine if the 'anticompetitive scheme is the State's own.' " *Id.* (quoting *Ticor Title*, 504 U.S. at 635, 112 S.Ct. 2169). We cited *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 100 L.Ed.2d 83

(1988), for the proposition that active supervision " 'requires that state officials have and exercise power to review particular anticompetitive acts of private parties,' " thereby ensuring that a private party's anticompetitive conduct promotes state policy rather than the party's own interest. *Bedell*, 263 F.3d at 260. We concluded that "[t]he States actively and continually monitor the implementation of portions of the [MSA]," *id.* at 261, but we were "not convinced that the States satisfy *Midcal's* 'active supervision' prong . . . because the States' supervision does not reach the parts of the [MSA] that are the source of the antitrust injury." *Id.* at 262.

It is arguable that in determining that the Majors were not entitled to *Parker* state action immunity, the *Bedell* court placed too little significance on the States' role in the implementation of the MSA. Plaintiffs' principally complain about the rise in cigarette prices following the MSA. *Bedell* recognized that the State has immunity for its role in negotiating, entering into, and enforcing the MSA, but noted that the M.S.A. contains no provision giving the State responsibility to supervise cigarette prices. As the court stated in *Bedell*, "it is clear the [MSA] empowers the tobacco companies to make anticompetitive decisions with no regulatory oversight by the States. Specifically, the defendants are free to fix and raise prices, allegedly without fear of competition." *Id.* at 260.

However, the absence of such a provision is as much state action as are the provisions included in the MSA. The rise in cigarette prices was made possible, at least in part, by the States' enforcement of the M.S.A. provisions

that prevent SPMs and NPMs from expanding their market share, specifically through the market share cap created by the M.S.A. and imposed on SPMs, M.S.A. IX(i)(1), and the TSAA provisions forcing NPMs to either face the same market share cap or pay into a state established escrow account. 35 Pa. Cons.Stat. § 5674. As a matter of logic, there may be some inconsistency in holding the State loses its *Parker* immunity for that which it did in its capacity as a State.

Nonetheless, even though the case before us differs from *Bedell* in that the parties are different, we feel bound by *Bedell* to abstain from reaching a different conclusion on *Parker* immunity. We cannot in conscience characterize the discussion on *Parker* immunity in *Bedell* as dicta. The Supreme Court, in discussing dicta, has stated, "this Court does not decide important questions of law by cursory dicta inserted in *unrelated cases." In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968) (emphasis added). This is neither "cursory dicta" nor an "unrelated case." The discussion makes clear the connection. As we stated in *Bedell*, "[b]ecause private participants in state action enjoy *Parker* immunity only to the extent the States enjoy immunity, the defendants are not shielded by *Parker*.[ ]" *Id.* at 266 (footnote omitted). Perhaps unintentionally, because the issue was not before it, by this sentence *Bedell* seems to have assumed, if not decided, that the States have no *Parker* immunity. Accordingly we, as did *Bedell* for the Majors, hold that the State officials are not entitled to *Parker* immunity.

Critics may with some justification regard our discussion of *Parker* immunity as dictum, and well it may be. In any event, the parties argued *Parker* immunity, *Bedell* discussed it at length and our discussion serves to complete the cycle.

V.

CONSTITUTIONAL CLAIMS

In addition to their antitrust claims, Plaintiffs include claims challenging the constitutionality of the M.S.A. under the Dormant Commerce Clause and Compact Clause. The District Court dismissed Plaintiffs' constitutional claims, concluding that Plaintiffs can prove no set of facts that the M.S.A. violates either clause. *Mariana v. Fisher*, 226 F.Supp. 2d 575 (M.D.Pa.2002). On appeal, we consider whether Plaintiffs properly have stated a cause of action under either the Commerce or Compact Clause.[5]

Although the District Court did not address Plaintiffs' standing, we do so now and conclude that because standing is a jurisdictional requirement, the District Court should have dismissed Plaintiffs' constitutional claims on this ground. Our analysis begins with a review of the rudimentary principles of standing. The standing doctrine is grounded in Article III of the Constitution, which limits the jurisdiction of federal courts to actual "cases" or "controversies." U.S.

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5. As an initial matter, we note that in their brief, Plaintiffs argue that both the M.S.A. and TSAA violate the Commerce Clause. However, we need only address their claims as to the M.S.A. as Plaintiffs' complaint alleges a violation under the Commerce Clause based only on the MSA, and not the TSAA.

Const. art. III, § 2. Thus, it is a jurisdictional requirement that a person challenging a government action be a party to a live case or controversy. *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 358 (4th Cir.2002).

The doctrine of standing is comprised of both " 'constitutional and prudential components.' " *Oxford Assocs. v. Waste Sys. Auth. of E. Montgomery County*, 271 F.3d 140, 145 (3d Cir.2001) (citation omitted). Summarizing its standing jurisprudence over the years, the Supreme Court articulated three "irreducible" elements for constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). First, the plaintiff must have suffered an "injury in fact," which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* Second, there must be a "causal connection between the injury and the conduct complained of." *Id.* Third and finally, it must be " 'likely' " rather than " 'speculative' " that a favorable decision will redress the injury. *Id.* at 561, 112 S.Ct. 2130 (citation omitted).

The prudential components of standing address the need for judicial restraint, thereby constituting a "supplemental aspect of the basic standing analysis." *Oxford Assocs.*, 271 F.3d at 145. When considering prudential standing, we examine the plaintiff's role because " '[t]he aim of this form of judicial self-governance is to determine whether the plaintiff is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.' " *Id.* (citations omitted). Thus, the limits of prudential standing

are used to ensure that those parties who can best pursue a particular claim will gain access to the courts. *Id.*

This court has recently articulated a three-part test for assessing whether a party satisfies prudential standing. First, prudential standing requires that a litigant assert his or her own legal interests rather than those of a third party. *Id.* at 145-46. Second, courts refrain from adjudicating abstract questions of wide public significance amounting to generalized grievances. *Id.* at 146. Third, a plaintiff must demonstrate that his or her interests are arguably within the "zone of interests" that are intended to be protected by the statute, rule, or constitutional provision on which the claim is based. *Id.* For the purposes of determining standing, the court must accept as true all material allegations set forth in plaintiffs' complaint and must construe those facts in favor of the plaintiffs. *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir.2003).

Bearing these principles in mind, it seems clear to us that Plaintiffs fail the test for both constitutional and prudential standing. During oral argument, Plaintiffs argued that our decision in *Oxford Assocs.* provided the authority for standing. In *Oxford Assocs.*, a group of building owners brought a suit pursuant to 42 U.S.C. § 1983 against a county's Waste Authority, challenging the Authority's implementation of a waste generation fee ("WGF") structure that forced them to use the local facility to the exclusion of cheaper out of state options. 271 F.3d at 143. Under the challenged fee structure, the building owners had to pay private trash haulers to transport their waste and also had to pay a separate WGF to the Authority to process that waste. *Id.* at 144. They alleged

that the purpose and effect of the WGF was to compel them to subsidize trash processing at the local facility in violation of the Commerce Clause. *Id.* The Authority challenged the building owner's standing on the third prong of the prudential standing test, arguing that their interests were outside the "zone of interests." *Id.* at 145-46. This court, by a divided panel, found that plaintiffs' interests fell within the "zone of interests" because the WGF was imposed directly on plaintiffs, the waste generators, and therefore they had standing to bring their Commerce Clause claim. *Id.* at 148.

Plaintiffs in this case have argued that because *Oxford Assocs.* "permitted [consumers] to bring a suit," they too have standing to make claims under the Commerce Clause. Tr. of Oral Arg., Mar. 12, 2003, at 13. Plaintiffs' reliance on *Oxford Assocs.* is misplaced. The building owners, plaintiffs in *Oxford Assocs.*, were directly subjected to the challenged fee and thus were asserting their own, rather than a third party's, interest. The court was not being asked to address a generalized grievance.

The case before us is easily distinguishable. We need not even reach the "zone of interests" prong of the prudential standing test as Plaintiffs (smokers) fail the test's first prong. Plaintiffs do not allege any personal injury as smokers. Instead, their brief is replete with instances of injury the M.S.A. causes SPMs and NPMs. For example, Plaintiffs argue that:

> The M.S.A. and TSAA do not expressly favor Pennsylvania manufacturers over out-of-state manufacturers; nor do they treat more favorably

> cigarettes manufactured or processed in Pennsylvania in comparison to cigarettes manufactured or processed elsewhere. This state regulation, however, has the purpose and effect of favoring a finite set of businesses, *i.e.*, the Majors, by protecting their market share through the output limitations and payment obligations imposed on SPMs and NPMs alleged in the complaint.

Br. of Plaintiffs at 45-46.

Plaintiffs do not complain that the MSA's payment structure injures them as smokers. Because Plaintiffs are not asserting their own legal interests but instead those of third parties — here the SPMs and NPMs — they are not analogous to the plaintiffs in *Oxford Assocs.*, who alleged that they personally were injured by the fee structure at issue in that case. Instead, Plaintiffs' Commerce Clause arguments devolve into nothing more than generalized grievances against the MSA. Accordingly, the doctrine of prudential standing precludes us from hearing such claims.

Moreover, Plaintiffs cannot get past the first of the constitutional standing requirements — injury in fact. The Court has made clear that to have constitutional standing, the " 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563, 112 S.Ct. 2130 (citation omitted). This injury must be concrete and particularized rather than conjectural or hypothetical. *Id.* at 560, 112 S.Ct. 2130. Unlike their allegations directed to

the antitrust laws, Plaintiffs make what can only be described as conjectural allegations as to their constitutional claims. The relevant Commerce Clause allegation in the complaint is merely: "The M.S.A. unduly encroaches upon the enumerated federal power over interstate commerce set forth in the United States Constitution, Article I, Section 8, Clause 3." App. at 52.

Plaintiffs' allegation as to the Compact Clause is no more descriptive:

> The M.S.A. is a multistate agreement that violates the Compacts Clause of the United States Constitution, Article I, Section 10, Clause 3, in that it is a combination tending to the increase of power in the states which has or may encroach upon the just supremacy of the United States to regulate interstate trade in the domestic cigarette market.

App at. 53.

Although Plaintiffs' brief is filled with generalized grievances as to how the M.S.A. § and TSAA force SPMs and NPMs to make payments that violate the antitrust laws, it fails to make particularized and concrete allegations as to how Plaintiffs, as smokers, suffer injury in fact, and therefore Plaintiffs lack constitutional standing.

VI.

CONCLUSION

For the reasons set forth, we will affirm the District Court's order dismissing Plaintiffs' complaint. As to Plaintiffs' antitrust claims, we have concluded that Defendants are entitled to immunity under *Noerr-Pennington*. We affirm the District Court's dismissal of Plaintiffs' constitutional claims, but we do so on jurisdictional grounds rather than on the merits.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED JULY 17, 2002

UNITED STATES DISTRICT COURT
M.D. PENNSYLVANIA

No. CIV. 1:CV-01-2070

June 17, 2002

Robert MARIANA, Michael J. McFadden, Karen M. Moran, and Edward M. Nankervis,

Plaintiffs

v.

D. Michael FISHER, in his official capacity as Attorney General of the Commonwealth of Pennsylvania, and Larry P. Williams, in his official capacity as Secretary of Revenue of the Commonwealth of Pennsylvania,

Defendants

* * *

MEMORANDUM

RAMBO, District Judge.

Before the court is Defendants' motion to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil

Procedure 12(b)(6), or, in the alternative, pursuant to Rule 12(b)(7). The parties have briefed the issues, and the motion is ripe for disposition.

I. *Background*

Plaintiffs' complaint, filed on January 10, 2002, alleges the following:

A. *Introduction and Parties*

Plaintiffs challenge certain provisions of the Master Settlement Agreement (hereinafter the "MSA") that the four largest United States tobacco companies (the "Majors") entered into with forty six states on November 23, 1998. Plaintiffs allege that the M.S.A. § violates Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as the Commerce and Compact Clauses of the United States Constitution.

Plaintiffs are all Pennsylvania residents and cigarette consumers. Defendant Michael Fisher is the Attorney General of Pennsylvania, and Defendant Larry Williams is the Secretary of the Pennsylvania Department of Revenue. Defendant Fisher was one of eight state Attorneys General that negotiated the MSA, and his office receives the payments from the settlement. Defendant Williams collects the revenues from the settlement. The Majors—Philip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company—are not named as Defendants in the instant suit because the Third Circuit has held that the *Noerr-Pennington* immunity doctrine

shields them from liability from suit. (Compl. at ¶ 10 (citing *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir.2001).)

B. *The Relevant Market*

The relevant market for Plaintiffs' antitrust action is the sale of tobacco products by cigarette manufacturers and importers of cigarettes in the United States. This market is highly concentrated. "For decades, the market consisted of six major manufacturers" which included the Majors, American Tobacco Company, and Vector Group. (Compl. at ¶ 12.) When the M.S.A. § was negotiated in 1998, the Majors collectively accounted for more than 98% of sales in the domestic market. In the first six months of 2001, the Majors had increased prices for cigarettes by 60%, and had a combined market share of 93.6%. The rest of the market is comprised of small manufacturers and importers.

Domestic cigarette consumption has not declined since the M.S.A. § was entered into. In 1999, there was a 10% decline in the shipments of cigarettes, but in 2000, shipments increased. At the manufacturers' level, industry revenues have increased from $21 billion in 1997 to $45 billion in 2000.

C. *The MSA*

The M.S.A. § was negotiated as a result of a series of lawsuits brought or threatened by the states against the Majors and other companies and organizations in the tobacco industry. The states sought to recover Medicaid funds

expended in treating tobacco related diseases. Pennsylvania filed suit against the Majors in April 1997. *Pennsylvania v. Philip Morris, Inc.*, No. 9704-2443 (Ct. Com. Pleas, Phila. County, April 1997). The suit was settled as part of the MSA.

Pursuant to the MSA, the Majors agreed to pay the settling states initial and annual payments totaling $206 billion over the first twenty-five years and $9 billion annually after that. The M.S.A. § also includes marketing restrictions, regulations of lobbying, and "restrictions on association." (Compl. at ¶ 18.) These restrictions have further entrenched the Majors' market share.

The Majors required that the M.S.A. § include structures so that the Majors could fund transfers of billions of dollars to the states by having wholesalers and consumers pay artificially high prices for cigarettes. The prices charged by the Majors since the M.S.A. § was entered into have generated revenue far in excess of what is needed to fund the M.S.A. § and have enabled the Majors to spend record amounts on advertising.

D. *The Output Cartel Created by the MSA*

Certain provisions of the M.S.A. § restrict the output of the Majors' competitors and prevent the competitors from gaining market share. The M.S.A. § was designed to destroy the free market for cigarettes so that consumers would not be able to choose lower priced products of companies that did not raise prices to fund the MSA. The state Attorneys General crafted the M.S.A. § to save the Majors and "ensure a perpetual shared and unregulated monopoly for [the Majors]." (Compl. at ¶ 20.)

Appendix B

The M.S.A. § prevents Subsequent Participating Manufacturers ("SPMs") and Non-Participating Manufacturers ("NPMs") of cigarettes from expanding their market share and prevents new competitors from entering the market. The M.S.A. § coerces smaller companies to join the MSA, and furthers a tradition of anticompetitive conduct. The M.S.A. § displaces competition in the cigarette industry in the following ways: (1) it contains discount sales by small competitors; (2) it prevents the entry of new competitors at the discount end of the market; (3) it prevents significant price competition among the Majors; and (4) it permits significant price increases through tacit agreements to raise prices.

The M.S.A. § has two provisions that stifle price competition. First, it requires each state to enact a "Qualifying Statute" that "effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers within such Settling State. . . ." (*Id.* at ¶ 24 (citing M.S.A. §§ IX(d)(2)(E).). The Qualifying Statutes require NPMs to pay "massive amounts" into an Escrow Fund for the payment of potential damages in future health care liability suits. A $50 million "enforcement" fund was established to finance enforcement of the Qualifying Statutes and the MSA.

Pennsylvania's Qualifying Statute is called the "Tobacco Settlement Agreement Act," ("TSAA"), 35 Pa. Stat. Ann. §§ 5672-5674. The TSAA requires that NPMs either become an SPM of the M.S.A. § or make payments into escrow. In 2000, payments were $2.09 per carton of cigarettes, increasing to $3.77 per carton in 2007. If the

NPMs' payments under the Qualifying Statute are higher than they would be as an SPM of the MSA, the excess is returned to the NPM.

The option to remain an NPM is prohibitively expensive, and "the only option that permitted an NPM to remain in business without violating the Qualifying Statutes was to join the M.S.A. § and become an SPM." (Compl. at ¶ 26.) Thus, small manufacturers became SPMs, but are restricted from gaining market share by the "Renegade Clause" in the MSA. This provision states: "A [n] [SPM] shall have payment obligations under this Agreement only in the event that its Market Share in any calendar year exceeds the greater of (1) its 1998 Market Share or (2) 125 percent of its 1997 Market Share." (Compl. at ¶ 27 (citing M.S.A. § § IX(i).) This provision creates disincentives for SPMs to increase production and market share.

The M.S.A. § also imposes barriers against new entrants in the market. Specifically, it provides that the 1997 market share for new entrants will be 0% for determining the market share cap. (*Id.* at ¶ 29 (citing M.S.A. §§ IX(i)(4).) New entrants must contribute settlement payments or pay penalties under the Qualifying Statutes.

The M.S.A. § also establishes penalties for the encroachment of market shares among the Majors. (*Id.* at ¶ 33 (citing M.S.A. §§ IX(d)(3)):

> This section [of the MSA] contains a complicated formula under which a manufacturer who gains market share relative to its 1997 market share has

> to pay an increased amount of the settlement in any given year and the manufacturer whose market share in that given year was less than its market share in 1997 will have to pay correspondingly less.

(*Id.*) Advertising and promotional restrictions also make it more difficult for the Majors to obtain incremental market shares.

E. *The Majors Take Advantage of the Output Cartel*

Within two days of executing the MSA, the Majors increased cigarette prices by $.45 per pack. Prices have consistently gone up, and the wholesale price of a carton of cigarettes has risen from approximately $19 per carton to $30 per carton in two and a half years. This has created "an acute but unfulfilled demand for affordable cigarettes." (*Id.* at ¶ 37.) The price increases have not been monitored or regulated by any state.

F. *Plaintiffs' Claims*

Plaintiffs assert the following claims: (1) the acts and agreements discussed above constitute a contract, combination or conspiracy in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1 (Count I); (2) the M.S.A. § violates the Commerce Clause, U.S. Const., art. I, § 8, cl. 3 (Count II); and (3) the M.S.A. § violates the Compact Clause, U.S. Const., art. I, § 10, cl. 3 (Count III). Plaintiffs seek declaratory judgment to enjoin Defendants from the continued implementation, enforcement and performance of

the M.S.A. § on behalf of Pennsylvania. Plaintiffs also seek attorneys fees, costs, and expenses.

II. *Legal Standard: Motion to Dismiss*

In deciding a motion to dismiss pursuant to Federal Rule 12(b)(6), the court is required to accept as true all of the factual allegations in the complaint and all reasonable inferences that can be drawn from the face of the complaint. *Nami v. Fauver,* 82 F.3d 63, 65 (3d Cir.1996). "The complaint will be deemed to have alleged sufficient facts if it adequately put[s] the defendant[s] on notice of the essential elements of the plaintiff's cause of action." *Nami,* 82 F.3d at 65. The court will not dismiss a complaint for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claims that would entitle her to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

"In determining whether a claim should be dismissed under [Federal] Rule 12(b)(6), a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record." *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1261 (3d Cir.1994). The court may consider an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] document." *Pension Ben. Guar. Corp. v. White Consol. Ind,* 998 F.2d 1192, 1196 (3d Cir.1993). Finally, in the Third Circuit, a court must grant leave to amend before dismissing a complaint that is merely deficient. *See, e.g., Weston v. Pennsylvania,* 251 F.3d 420, 428 (3d Cir.2001); *Shane v. Fauver,* 213 F.3d 113, 116-17 (3d Cir.2000).

Appendix B

III. *Discussion*

A. *Count I: Antitrust Claims*

Defendants move to dismiss Plaintiffs' antitrust claims for the following reasons: (1) Plaintiffs' claims are barred under the *Noerr-Pennington* doctrine; (2) the M.S.A. § and TSAA are state action which is exempt from antitrust laws; (3) the M.S.A. § and TSAA do not "irreconcilably conflict" with and are not preempted by the Sherman Act; and (4) the provisions of the M.S.A. § and the TSAA do not require or authorize any unlawful agreement to restrict output. As discussed below, the court finds that Defendants are entitled to *Noerr-Pennington* immunity. While the court will briefly address the issue of *Parker* immunity in addition to *Noerr-Pennington* immunity, it is not necessary to address Defendants' other bases for dismissal of the Sherman Act claims.

1. *Noerr-Pennington Doctrine*

Defendants first assert that Plaintiffs' antitrust claims are barred by the *Noerr-Pennington* doctrine. The Third Circuit recently described the doctrine as follows: "[r]ooted in the First Amendment and fears about the threat of chilling political speech, the doctrine was first recognized in two Supreme Court cases holding federal antitrust laws inapplicable to private parties who attempted to influence government action-even where the petitioning had anticompetitive effects." *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 250 (3d Cir.2001) (citing *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585,

14 L.Ed.2d 626 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)). Pursuant to this doctrine, immunity extends to attempts to petition all departments of the government. *Id.* Finally, "if [] conduct constitutes valid petitioning, the petitioner is immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning." *Id.* at 251.

In *Bedell,* a cigarette wholesaler brought a class action suit against the Majors. The plaintiff sought damages and injunctive relief for alleged antitrust injuries flowing out of certain provisions of the MSA. *Id.* at 241. The district court dismissed the Sherman Act claims, finding the Majors immune from suit pursuant to *Noerr-Pennington. Id.* at 250.

On appeal, the Third Circuit refused to differentiate a settlement from other acts associated with litigation to which courts have extended *Noerr-Pennington* immunity. *Id.* at 252-53 (citing *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) (extending *Noerr* immunity to actions before administrative agencies and the courts); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir.1992) (extending *Noerr* immunity to include efforts to influence governmental action incidental to litigation); *Coastal States Mktg., Inc. v. Hunt,* 694 F.2d 1358, 1367-68 (5th Cir.1983) (same)). Thus, the appellate court affirmed the district court with respect to the *Noerr-Pennington* issue. *Id.* at 254 ("Freedom from the threat of antitrust liability should apply to settlement agreements as it does to other more traditional petitioning

activities. We hold the defendants are immune under the *Noerr-Pennington* doctrine.")

Defendants in the instant action, *i.e.*, Attorney General Fisher and Secretary Williams, assert that *Bedell* mandates dismissal of the case at bar. Defendants aver that the Third Circuit in *Bedell* held "that antitrust claims predicated on the M.S.A. § and the TSAA are barred by *Noerr* immunity." (Defs. Br. Supp. Mot. Dism., "Defs. Supp. Br." at 19.) Defendants further contend that Plaintiffs are trying to circumvent the holding of *Bedell* with respect to *Noerr-Pennington* immunity by naming Commonwealth officials as Defendants rather than the private tobacco manufacturers. (*Id.* at 20.)

In response, Plaintiffs argue, "[w]hen a private party asks a State or state official to adopt or agree to a restraint of trade, neither the restraint adopted nor enforcement or implementation by the State or state official becomes immune simply because someone asked for the restraint." (Pls. Br. Opp. Mot. Dism., "Pls. Opp. Br." at 13.) Plaintiffs cite *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) in support of their position. While the *Midcal* case is pertinent to the issue of antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), discussed *infra*, it is not relevant to the issue of whether Defendants are entitled to *Noerr-Pennington* immunity.[1]

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1. *Midcal* involved a lawsuit by a wine distributer challenging California's resale price maintenance and price posting statutes for

(Cont'd)

Essentially, Plaintiffs assert that *Parker v. Brown,* not the *Noerr-Pennington* doctrine, is the proper basis on which to analyze government conduct in an antitrust suit. Plaintiffs cite a litany of cases that support this position. *See, e.g., Bedell,* 263 F.3d at 250 ("*Parker* protects the States' act of governing, and Noerr the citizens' participation in government."); *Nursing Registry, Inc. v. Eastern North Carolina Reg'l. Emerg. Med. Servs. Consortium, Inc.,* 959 F.Supp. 298 (E.D.N.C.1997); *Bright v. Ogden City,* 635 F.Supp. 31, 33 (D.Utah 1985) (stating that state action doctrine is separate from *Noerr-Pennington* doctrine, and that states may not be immune from liability even if private actors are immune); *see also Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.,* 858 F.2d 1075, 1086 ("*Noerr-Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment."); *In re Airport Car Rental Antitrust Litigation,* 693 F.2d 84, 87 (9th Cir.1982) (stating that liability of state and private entities are governed by different doctrines and one may be immune even if the other is not).

Defendants take the position that, in appropriate circumstances, *Noerr-Pennington* immunity extends to

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(Cont'd)

wine wholesalers. 445 U.S. at 99, 100 S.Ct. 937. The page cited by Plaintiffs contains a discussion of the Twenty-first Amendment of the United States Constitution, a provision completely irrelevant to the instant action. *Id.* at 110, 100 S.Ct. 937. Although the *Midcal* opinion also discusses *Parker* immunity, that discussion is not relevant to the court's determination of *Noerr-Pennington* immunity. The nuances of each are discussed more fully above.

government agencies, and not just private citizens. Defendants rely heavily on the Third Circuit's decision in *Herr v. Pequea Township,* 274 F.3d 109 (3d Cir.2001). In *Herr,* a land developer sued a township and three of its supervisors, alleging that the township violated his substantive due process rights through a campaign to obstruct the plaintiff's development project. *Id.* at 110. *Herr* did not involve an antitrust claim. However, the Third Circuit discussed the *Noerr-Pennington* doctrine, and noted that "the restrictions on liability [under *Noerr-Pennington*] are applicable to liability under state tort laws . . . and to liability under the Civil Rights Act." *Id.* at 117 (citing *Video Int'l Prod.*, 858 F.2d at 1084). The government defendants in *Herr* were actual participants in proceedings before the Lancaster County Planning Commission, the Department of Environmental Review, the Environmental Hearing Board, the Zoning Hearing Board, and certain courts. *Id.* at 110. The Third Circuit held that the township's and officials' conduct was protected because the defendants "participated in proceedings *before other governmental agencies* authorized to resolve issues like those here presented." *Id.* at 112 (emphasis added).

Defendants also cite *Manistee Town Center v. City of Glendale,* 227 F.3d 1090, 1092 (9th Cir.2000). In *Manistee,* the City of Glendale lobbied the county to stop the county from leasing space in a shopping center owned by the plaintiff. *Id.* at 1091. The Ninth Circuit Court of Appeals affirmed the dismissal of the claims based on the *Noerr-Pennington* doctrine. *Id.* The court explained:

> Government officials are frequently called upon to be ombudsmen for their constituents. In this

> capacity, they intercede, lobby, and generate publicity to advance their constituents' goals, both expressed and perceived. This kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens.

Id. While the Ninth Circuit noted that precedent regarding the applicability of *Noerr-Pennington* to petitioning governmental bodies is "sparse," it also stated that existing cases support its conclusion. *Id.* at 1094 (citing *Miracle Mile Assocs. v. City of Rochester,* 617 F.2d 18, 20 (2d Cir.1980); *Fischer Sand & Aggregate Co. v. City of Lakeville,* 874 F.Supp. 957, 959-60 (D.Minn.1994); *County of Suffolk v. Long Island Lighting Co.,* 710 F.Supp. 1387, 1390 (E.D.N.Y. 1989)).

Defendants in the instant action are entitled to *Noerr-Pennington* immunity. Defendant Fisher instituted a lawsuit on behalf of the Commonwealth of Pennsylvania. In doing so, he petitioned the courts "to recover damages which the Commonwealth and its citizens have sustained as a result of the unlawful and concerted actions of the defendants." *Pennsylvania v. Philip Morris, Inc.,* No. 9704-2443 (Ct.Cm. Pleas, Phila.1997) (Compl. at ¶ 15.) The *Noerr-Pennington* doctrine immunizes petitions that are directed at any branch of the government, including the judiciary. *California Motor Trans. Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In petitioning the judicial branch for redress, Defendant Fisher was petitioning the courts to advance his constituents' goals. Furthermore, the Third Circuit has defined the states conduct here as "petitioning."

Bedell, 263 F.3d at 253 ("[T]he petitioning here invoked the state's traditional powers to regulate the health and welfare of its citizens.") Because the M.S.A. § arose out of a petition in proceedings before other governmental agencies authorized to resolve such issues, the court finds that Defendants are entitled to *Noerr-Pennington* immunity. The court also holds that Plaintiffs' complaint is not merely deficient and that granting leave to amend would not enable Plaintiffs to state a viable claim under the Sherman Act. Therefore, Count I will be dismissed.

2. *State Action Doctrine*

Defendants also proffer that even if they are not entitled to *Noerr-Pennington* immunity, their conduct is protected from antitrust liability as state action under *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). As the court has already determined that Defendants are entitled to *Noerr-Pennington* immunity, it need not provide a lengthy discussion of *Parker* immunity. However, the court will briefly address this issue.

In *Parker,* the Supreme Court held that "[a]ntitrust laws do not bar anticompetitive retraints that sovereign states impose 'as an act of government.'" *Bedell,* 263 F.3d at 254 (citing *Parker,* 317 U.S. at 352, 63 S.Ct. 307; *Massachusetts School of Law at Andover, Inc. v. Am. Bar Ass'n,* 107 F.3d 1026, 1035 (3d Cir.1997)). In order to receive *Parker* immunity, the anticompetitive restraint must be the product of sovereign state action. *Id.* In *Bedell,* the Third Circuit discussed the application of *Parker* immunity to the MSA. *Id.* at 254-66.

Appendix B

The Third Circuit applied the test promulgated in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), in order to determine whether the M.S.A. § should be considered state action.[2] The *Midcal* test has two prongs. First, to qualify as state action, the restraint must be "clearly articulated and affirmatively expressed as state policy." *Midcal,* 445 U.S. at 104, 100 S.Ct. 937 (citation omitted). Second, the challenged restraint must be "actively supervised" by the state. *Bedell,* 263 F.3d at 260. "The essential inquiry of the 'actively supervised' prong is to determine if the 'anticompetitive scheme is the State's own.'" *Id.* (citing *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)).

The Third Circuit made two findings with respect to the MSA. First, the court held that the M.S.A. § was the product of a clearly articulated state policy. *Id.* However, the court also held that there is not adequate state supervision of the M.S.A. § to satisfy the second prong of *Midcal. Id.* at 265. Accordingly, the court found that the "participants" to the M.S.A. § are not entitled to *Parker* immunity. *Id.*

Defendants in the case at bar would have the court follow Bedell with respect to *Noerr-Pennington* immunity, while asking the court to disregard the opinion with respect to

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2. *Midcal* is applicable "[w]hen it is uncertain whether an act should be treated as state action for the purposes of *Parker* immunity . . . to 'determine whether anticompetitive conduct engaged in by private parties should be deemed state action.'" *Bedell,* 263 F.3d at 255 (citing *Patrick v. Burget,* 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988)).

Parker immunity. Defendants label the discussion of *Parker* immunity in Bedell as dicta. Even if the court were to view the twelve pages of opinion in Bedell regarding *Parker* immunity as dicta, it is clearly indicative of how the Third Circuit would rule if presented with the case at bar. Thus, the court finds that in the action before it, Defendants are not entitled to Parker immunity. However, as the court has already determined that Defendants are entitled to *Noerr-Pennington* immunity, the Sherman Act claim will still be dismissed.

B. *Count II: Commerce Clause*

In Count II of the their complaint, Plaintiffs allege that "the M.S.A. § unduly encroaches upon the enumerated federal power over interstate commerce set forth in the United States Constitution, Article I, Section 8, Clause 3." (Compl. at ¶ 51.) Where state laws impermissibly discriminate against interstate commerce, this implicates what is sometimes referred to as the "dormant" or "negative" aspect of the Commerce Clause. *See West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

The Supreme Court applies a two-tiered analysis to claims that a state regulation violates the Commerce Clause. First, a state regulation is automatically struck down if it "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers v. New York Liquor Auth.,* 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (citations omitted). However, where a state regulates commerce evenhandedly

and only affects interstate commerce indirectly, then courts must apply the balancing test derived from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). The *Pike* balancing test asks "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman,* 476 U.S. at 579, 106 S.Ct. 2080 (citing *Pike,* 397 U.S. at 142, 90 S.Ct. 844).

There is no bright line rule for determining whether a state regulation is *per se* invalid or requires the application of the *Pike* balancing test. Instead, courts must look at "the overall effect of the statute on both local and interstate activity." *Id.* (citing *Raymond Motor Transp., Inc. v. Rice,* 434 U.S. 429, 440-41, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978)). Notably, the Commerce Clause does not prevent states from passing legislation that benefits their citizens' health and safety. *See Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 443-44, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) ("[T]he Constitution . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.")

In moving to dismiss Plaintiffs' Commerce Clause claim, Defendants argue that the M.S.A. § does not discriminate against out of state goods; that it was not executed with protectionist goals; that it does not target out of state commerce; and that it evenhandedly imposes obligations on U.S. cigarette manufacturers. Defendants also cite several cases, and assert that no courts have found that the M.S.A. § or qualifying statutes violate the Commerce Clause.

(Defs. Supp. Br. at 35) (citing *Star Scientific, Inc. v. Beales,* 278 F.3d 339 (4th Cir.2002); *Forces Action Project LLC v. California,* No. C-99-0607 MJJ (N.D.Cal. Jan.15, 2000); *Star Scientific, Inc. v. Carter,* No. IP O1-0838-C T/G (S.D.Ind. Aug. 20, 2001); *Premium Tobacco Stores, Inc. v. Fisher,* 51 F.Supp.2d 1099, 1105 (D.Colo.1999).)

In response, Plaintiffs assert that the M.S.A. § and TSAA control conduct outside of Pennsylvania and interfere with interstate commerce in the following ways: (1) the M.S.A. § calculates payments based on national market shares rather than local market shares, and, by passing on costs to consumers in every state, "effectively collects money from consumers in other states" (Pls. Opp. Br. at 31;) (2) the M.S.A. § limits national sales and market shares by imposing larger payments on SPMs who increase their national market shares, effectively giving up their cost advantage in states that are not M.S.A. § parties to avoid incurring the M.S.A. § penalties associated with gaining market shares; (3) the TSAA affects sales by NPMs occurring entirely outside of Pennsylvania, thereby raising prices in all fifty states; and (4) the M.S.A. § coerces states to enact qualifying statutes that result in costs to the Majors' competitors which are passed on to consumers. As legal support for their Commerce Clause claim, Plaintiffs rely heavily on two Supreme Court cases. *See Healy v. Beer Inst.,* 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *Brown-Forman,* 476 U.S. at 582-83, 106 S.Ct. 2080. Plaintiffs also assert that the cases cited by Defendants regarding Commerce Clause challenges to the M.S.A. § are inapposite.

Appendix B

The court will begin with a review of the Supreme Court cases relied upon by Plaintiffs. Both *Brown-Forman* and *Healy* tested the validity of state liquor price-affirmation statutes. *Healy,* 491 U.S. at 326, 109 S.Ct. 2491; *Brown-Forman,* 476 U.S. at 575-76, 106 S.Ct. 2080. In *Brown-Forman,* a distiller who sold alcohol in New York State and other states challenged a statute that required distillers and agents selling alcohol in New York State to file a monthly price schedule with the State Liquor Authority. 476 U.S. at 575, 106 S.Ct. 2080. The price schedule had to include an affirmation that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold" in any other state during the month covered by the schedule. *Id.* at 576, 106 S.Ct. 2080. In *Healy,* the challenged statute required that "out-of-state shippers [of alcohol into Connecticut] to affirm that their prices are no higher than the prices being charged in the border States as of the moment of affirmation." 491 U.S. at 335, 109 S.Ct. 2491. The Supreme Court struck down both provisions as violative of the Commerce Clause. *Healy,* 491 U.S. at 343, 109 S.Ct. 2491; *Brown-Forman,* 476 U.S. at 584, 106 S.Ct. 2080.

In *Healy,* the Supreme Court discussed general principles gleaned from Commerce Clause cases:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, the Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the

> State's borders, whether or not the commerce has effects within the State. . . . [S]pecifically, a State may not adopt legislation that has the practical effect of establishing a scale of prices for use in other states. . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State . . . is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interfere with the legitimate regulatory regimes of other States. . . . Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state. And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

Id. at 336-37, 109 S.Ct. 2491 (internal citations omitted).

Applying these principles, the Court concluded that Connecticut's price affirming statute effectively controlled commercial activity occurring wholly outside Connecticut. *Id.* at 337, 109 S.Ct. 2491. Furthermore, the court noted that the statute, in conjunction with the price affirming statutes

of other states, created a competing and interlocking economic regulation that is invalid under the Commerce Clause. *Id.*

Plaintiffs argue at length that the M.S.A. § and TSAA result in the forfeiture of a competitive advantage in states that are not parties to the MSA. The Supreme Court did state in *Brown-Forman* and *Healy* that "States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market." *Id.* at 339, 114 S.Ct. 2205 (citing *Brown-Forman,* 476 U.S. at 580, 106 S.Ct. 2080). However, while both *Healy* and *Brown-Forman* contain general standards with respect to Commerce Clause violations, the cases are very fact specific. In *Healy,* the Court noted that the case was its "fourth expedition into the area of price-affirmation statutes." 491 U.S. at 331, 109 S.Ct. 2491. The Court further stated that the Connecticut law was invalid on its face because it singled out brewers and shippers of beer that engaged in interstate commerce. *Id.* at 340-41, 109 S.Ct. 2491. Finally, when concluding its opinion in *Healy,* the Supreme Court sought to remove "any lingering uncertainty about the constitutional validity of affirmation statutes." *Id.* at 343, 109 S.Ct. 2491. Thus, the Court indicated that its inquiry, if not limited, was largely focused on price-affirmation statutes.

Turning to the case at bar, neither the facts, nor the general principles of *Brown-Forman* or *Healy,* support Plaintiffs' allegations that the M.S.A. § violates the Commerce Clause. First, unlike the price affirmation laws before the Supreme Court, the M.S.A. § is not a statute

promulgated by the state legislature. Rather, it is a settlement agreement that disposed of pending litigation.[3] Thus, while Plaintiffs attempt to draw analogies to *Brown-Forman* and *Healy,* the M.S.A. § does not contain "pricing decisions [that] are imported by statutes into the [local] market regardless of local competitive conditions." *Healy,* 491 U.S. at 339, 109 S.Ct. 2491.

Even if the court here applies the general principles of *Healy,* Plaintiffs have failed to allege a cause of action under the Commerce Clause. There is no allegation that the M.S.A. § adopts a scale of prices that is applicable in other states, and the M.S.A. § does not contain mandates on pricing akin to those in *Healy* or *Brown-Forman.* Furthermore, there is no set of facts that Plaintiffs could prove that would show that Defendants are controlling conduct beyond the state, especially not in a way that has the effect of favoring in-state economic interests over out of state economic interests. Finally, there are no allegations regarding inconsistent regulations that arise from the projection of a Pennsylvania regulatory scheme onto another state. Pennsylvania is not forcing extraterritorial cigarette manufacturers to seek regulatory approval before they conduct business in Pennsylvania or any other state.

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3. While Plaintiffs put forth an argument about how the TSAA violates the Commerce Clause in the briefing, Plaintiffs' complaint only contains a Commerce Clause claim based on the MSA. (Compl. at ¶ 51.) Thus, the court need not address whether the TSAA violates the Commerce Clause. While making no specific legal findings herein, the court notes that at least two other courts have dismissed Commerce Clause claims challenging qualifying statutes. *See Star Scientific, Inc. v. Beales,* 278 F.3d 339 (4th Cir.2002); *PTI v. Philip Morris, Inc.,* 100 F.Supp.2d 1179, 1201 (C.D.Cal.2000).

Notably, another district court reached the same conclusion in *Forces Action Project LLC v. California,* No. C 99-0607 MJJ, Order (N.D.Cal. Jan. 15, 2002). There, several smokers' rights groups and approximately 400 individual smokers sued various parties to the MSA. The plaintiffs sought to amend their complaint to include a claim that the M.S.A. § violates the Commerce Clause. The district court held that such an amendment would be futile:

> [P]laintiffs do not provide [the] court with any indication how the M.S.A. § discriminates, on its face, between out-of-state and in-state goods. Even if they had, such an allegation would be contrary to the terms of the M.S.A. § which appears to apply equally over all states, making no distinction based on the origin of the cigarette. In addition, there is no indication why the higher prices allegedly caused by the M.S.A. § burden commerce.

Id. at 13.[4]

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4. With respect to the issue of shifting costs to consumers, the Ninth Circuit addressed a similar issue in *Table Bluff Reservation (Wiyot Tribe) v. Philip Morris, Inc.,* 256 F.3d 879 (9th Cir.2001). In *Table Bluff,* twenty Indian tribes (the "Tribes") filed a class action complaint against certain tobacco companies that are M.S.A. § parties. *Id.* at 881. The Tribes alleged, among other things, that increased cigarette prices that resulted from the M.S.A. § resulted in a due process violation. *Id.* at 885. The Ninth Circuit rejected this argument, stating that "no constitutional injury occurs when a manufacturer passes on higher costs in the form of price increases." *Id.* While

(Cont'd)

Similarly, the court here finds that Plaintiffs have failed to state a cause of action that the M.S.A. § violates the Commerce Clause. Moreover, the court need not grant leave to amend, as the complaint is not merely deficient. Accordingly, the court will dismiss Count II of Plaintiffs' complaint.

C. *Compact Clause*

Finally, in Count III of the Complaint, Plaintiffs allege that the M.S.A. § violates the Compact Clause of the Constitution, which provides that "no State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. Const. art. I, § 10, cl. 3. Supreme Court precedent limits the applicability of the Compact Clause "to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Virginia v. Tennessee,* 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537 (1893); *see also Northeast Bancorp., Inc. v. Board of Governors of the Fed. Res. Sys.,* 472 U.S. 159, 175-76, 105 S.Ct. 2545, 86 L.Ed.2d 112 (1985); *United States Steel Corp. v. Multistate Tax Comm'n,* 434 U.S. 452, 471, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978); *New Hampshire v. Maine,* 426 U.S. 363, 369, 96 S.Ct. 2113, 48 L.Ed.2d 701 (1976).

(Cont'd)

Table Bluff did not involve a Commerce Clause challenge to the MSA, the court here believes that the language is relevant. Simply because the M.S.A. § result in higher costs to consumers, which is the sum and substance of Plaintiffs' position, does not mean that there was a violation of the Commerce Clause.

Appendix B

The Third Circuit has not addressed whether the M.S.A. § violates the Compact Clause, however, the Fourth Circuit addressed the question in *Star Scientific, Inc. v. Beales,* 278 F.3d 339 (4th Cir.2002). There, an NPM challenged Virginia's qualifying statute as well as the MSA. *Id.* at 343. The district court dismissed the plaintiffs' complaint, and the Fourth Circuit affirmed. Addressing the Compact Clause challenge, the court found that the M.S.A. § contains "a horizontal aspect . . . that establishes a compact among the states, implicating the Compact Clause." *Id.* at 360. However, the court went on to hold that the compact did not encroach upon federal power. *Id.* Specifically, the Fourth Circuit determined that the states that are parties to the M.S.A. § are not exercising any powers that they could not exercise independently, and the M.S.A. § leaves open the potential for Congress to regulate tobacco. *Id.*

In the case at bar, Plaintiffs assert that the M.S.A. § violates the Compact Clause first "at the expense of the Sherman Act and the Commerce Clause." (Pls. Opp. Br. at 37.) The court has already determined that it will dismiss Plaintiffs' Sherman Act and Commerce Clause claims, therefore this argument is without merit. Plaintiffs also rely heavily on the MSA's provision that creates an administrative body. However, as noted by the Fourth Circuit in *Star Scientific,* "the Supreme Court [has] upheld a compact resulting in reciprocal state legislation and establishing an administrative body to coordinate State taxation of certain entities." *Id.* (citing *Multistate Tax Comm'n.,* 434 U.S. at 472-73, 98 S.Ct. 799). Plaintiffs attempt to differentiate the facts here from those in *Multistate Tax Commission* which the Fourth Circuit relied upon in *Star Scientific.* However,

the court finds the Fourth Circuit's reasoning to be persuasive. Moreover, granting leave to amend would be futile, as there is no set of facts that Plaintiffs could plead to properly allege that the M.S.A. § violates the Compact Clause. Accordingly, the court will also dismiss Count III of Plaintiffs' complaint.

IV. *Conclusion*

Defendants are immune from antitrust liability pursuant to the *Noerr-Pennington* doctrine because the M.S.A. § arose out of proceedings in which Defendants acted as petitioners. Thus, Plaintiffs have failed to state a claim for a violation of the Sherman Act, and the court will dismiss Count I of Plaintiffs' complaint. Furthermore, Plaintiff can prove no set of facts that will establish that the M.S.A. § violates either the Commerce Clause or the Compact Clause of the United States Constitution. Accordingly, the court will dismiss Counts II and III of Plaintiffs' complaint. An appropriate order will issue.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 3, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-2906

ROBERT MARIANA; MICHAEL J. MCFADDEN;
KAREN M. MORAN; EDWARD M. NANKERVIS,

Appellants

v.

D. MICHAEL FISHER, in his official capacity as Attorney General of the Commonwealth of Pennsylvania;
LARRY WILLIAMS, in his official capacity as Secretary of Revenue of the Commonwealth of Pennsylvania

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, and FUENTES, SMITH, CHERTOFF and ALARCÓN*, Circuit Judges

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* Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

Appendix C

The petition for rehearing filed by Appellants, Robert Mariana, Michael J. McFadden, Karen M. Moran and Edward N. Nankervis, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: September 3, 2003

APPENDIX D — RELEVANT PROVISIONS OF THE PENNSYLVANIA TOBACCO SETTLEMENT AGREEMENT ACT

ACT 35 P.S. § 5673

§ 5673. Definitions

* * *

"Tobacco product manufacturer."

(1) A person that after the date of enactment of this act directly and not exclusively through any affiliate:

(i) manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where the importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to the cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement and provided that the manufacturer of the cigarettes does

not market or advertise the cigarettes in the United States);

(ii) is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(iii) becomes a successor of a person described in subparagraph (i) or (ii).

(2) The term shall not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls under paragraph (I)(i), (ii) or (iii).

"Units sold." The number of individual cigarettes sold in this Commonwealth by the applicable tobacco product manufacturer during the year in question, as measured by taxes collected by the Commonwealth on packs, or "roll-your-own" tobacco containers, bearing the tax stamp of the Commonwealth required under section 1215 of the act of March 4, 1971 (P.L. 6, No. 2), known as the Tax Reform Code of 1971.[1] The Department of Revenue shall promulgate such regulations as are necessary to ascertain the amount of State tax paid on the cigarettes of such tobacco product manufacturer for each year.

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1. 72 P.S. § 8215.

Appendix D

ACT 35 P.S. § 5674

§ 5674. Requirements

(a) General rule.—Any tobacco product manufacturer that sells cigarettes to consumers within this Commonwealth after the effective date of this act shall do one of the following:

(1) Become a participating manufacturer as defined in the Master Settlement Agreement and generally perform its financial obligations under the Master Settlement Agreement.

(2) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts, as the amounts are adjusted for inflation:

(i) 2000 – $.0104712 per unit sold after the effective date of this act.

(ii) For each of 2001 and 2002 – $.0136125 per unit sold.

(iii) For each of 2003 through 2006 – $.0167539 per unit sold.

(iv) For each of 2007 and each year thereafter – $.0188482 per unit sold.

(b) Funds in escrow.—A tobacco product manufacturer that places funds into escrow under subsection (a)(2) shall receive the interest or other appreciation on such funds as earned. The funds themselves shall be released from escrow only under the following circumstances:

(1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the Commonwealth or any releasing party located or residing in this Commonwealth. Funds shall be released from escrow under this paragraph in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such judgment or settlement.

(2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the Commonwealth's allocable share of the total payments that the manufacturer would have been required to make in that year under the Master Settlement Agreement had it been a participating manufacturer, as such payments are determined pursuant to section IX(i)(2) of the Master Settlement Agreement and before any of the adjustments or offsets described in section IX(i)(3) of the Master Settlement Agreement other than the inflation

adjustment, the excess shall be released from escrow and revert back to such tobacco product manufacturer.

(3) To the extent not released from escrow under paragraph (1) or (2), funds shall be released from escrow and revert back to the tobacco product manufacturer 25 years after the date on which they were placed into escrow.

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